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IN THE

Supreme Court of the United States

MARCH TERM, 1945

No. 1088

EMANUEL DEUTSCH, individually and doing business under the firm name and style of UNITY SANITARY SUPPLY CO.,

Petitioner,

against

HERMAN HOGE, ARTHUR HOGE, GUS HOGE, JOEL HOGE and OLIVER HOGE, individually and doing business under the firm name and style of HOGE BRUSH COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and Associate Justices of the United States Supreme Court:

Emanuel Deutsch, individually and doing business under the firm name and style of Unity Sanitary Supply Co., the petitioner above named, respectfully prays that a writ of certiorari issue to review the decree of the United States

Circuit Court of Appeals for the Second Circuit, affirming by a divided court an order dated November 10, 1943, made by Hon. Henry W. Goddard, District Judge, and entered on November 20, 1943, in the clerk's office of the United States District Court, Southern District of New York, dismissing this action for want of jurisdiction of the persons of the respondents. The decree of the Circuit Court of Appeals was entered on December 29, 1944.

Jurisdiction of this Court.

The decree of the Circuit Court of Appeals was entered on December 29, 1944, and no petition for a rehearing was prayed for. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, C. 229 (43 Stat. 938), 28 U. S. C. A., Section 347.

Questions Presented.

The appeal below presented a number of questions and no new or different questions arise on this petition. The following are the questions:

1. Were and are the respondents engaged in business in the state of New York, making them amenable to the jurisdiction by service of process under Section 229 b, Civil Practice Act of the State of New York?

2. If respondents were not actively engaged in business in New York State, are they nevertheless subject to jurisdiction upon service of process pursuant to Section 229 b, Civil Practice Act of the State of New York, in an action arising out of a business transaction conducted in the state of New York?

Statutes Involved.

Section 229 b, Civil Practice Act of the state of New York (C. 99, Laws of 1940 of New York State, as amended by C. 455, Laws of 1941 of New York State) so far as here applicable, reads:

> "When any natural person or persons not residing in this state shall engage in business in this state, in any action against such person or persons arising out of such business, the summons may be served by leaving a copy thereof with the complaint with the person who, at the time of service, is in charge of any business in which the defendant or defendants are engaged within this state, and any summons so served shall be of the same legal force and validity as if served personally on such nonresident person or persons so engaging in business in this state within the territorial jurisdiction of the court from which the summons issues, provided that a copy of such summons and complaint together with a notice of such service upon such person in charge of such business according to the provisions of this section shall be forthwith sent to such nonresident person or persons by registered mail, return receipt requested.
>
> "The plaintiff shall file with the clerk of the court in which the action is pending, or with the judge or justice of such court in case there be no clerk, an affidavit of compliance herewith, a copy of the summons and complaint, and either a return receipt purporting to be signed by the defendant or defendants, or a person qualified to receive his or their registered mail, in accordance with the rules and customs of the post-office departments; or, if acceptance was refused by the defendant or defendants, or his or their agent, the original envelope bearing a notation by the postal authorities that receipt was refused, and an affidavit by or on behalf

of the plaintiff that notice of such mailing and refusal was forthwith sent to the defendant or defendants by ordinary mail. Where the summons is mailed to a foreign country, other official proof of the delivery of the mail may be filed in case the postoffice department is unable to obtain such a return receipt. The foregoing papers shall be filed within thirty days after the return receipt or other official proof of delivery or the original envelope bearing a notation of refusal, as the case may be, is received by the plaintiff. Service of process shall be complete ten days after such papers are filed. The return receipt or other official proof of delivery shall constitute presumptive evidence that the summons mailed was received by the defendant or defendants or a person qualified to receive his or their registered mail; and the notation of refusal shall constitute presumptive evidence that the refusal was by the defendant or defendants or his or their agent.

* * * * * *

"The court in which the action is pending may order such extensions as may be necessary to afford the defendant reasonable opportunity to defend the action."

Statement.

This action was originally commenced in the Supreme Court of the state of New York, county of New York, by the service of a copy of the summons and complaint on June 10, 1943, on the respondents, pursuant to Section 229 b, Civil Practice Act of the state of New York, and by the filing of the summons and complaint on June 25, 1943, in the office of the clerk of the county of New York (R., pp. 9, 58-62, 93). On respondents' application, this action was

removed to the United States District Court for the Southern District of New York (R., p. 10).

Petitioner alleges three causes of action in his complaint. In the first cause of action, petitioner seeks damages in the sum of $39,374.55 (R., p. 85) by reason of respondents' breach of contract made in the city of New York, under which respondents agreed to furnish and deliver a quantity of brushes to petitioner (R., pp. 83-85). In the second cause of action, petitioner seeks to recover $2,000 (R., p. 88) for goods delivered by petitioner to respondents in the city of New York, which goods respondents agreed to use in the manufacture of the brushes, the subject of the first cause of action, and which goods the respondents converted to their own use (R., pp. 86-88). In the third cause of action, petitioner seeks to recover the sum of $60,000 (R., p. 88) damages he sustained as a result of respondents' breach of contract to deliver brushes to petitioner pursuant to an agreement made in the city of New York (R., p. 88).

The respondents appeared specially and moved to dismiss the complaint on the ground that the court had no jurisdiction over the persons of the respondents (R., pp. 7-8). The application was granted by Hon. Henry W. Goddard, District Judge of the United States District Court for the Southern District of New York (R., pp. 5-7), based upon a written opinion (R., pp. 96-97). Petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit and the order appealed from was affirmed by a divided court (R., pp. 108-110), Circuit Judge Learned Hand filing a dissenting opinion (R., pp. 105-107).

Specifications of Errors to Be Urged.

1. That the respondents were and are engaged in business in the state of New York, making them subject to the service of process under Section 229 b, Civil Practice Act of the state of New York.

2. Even if respondents were not actively engaged in business in New York State, they are subject to service of process pursuant to Section 229 b, Civil Practice Act of the state of New York, in an action arising out of a business transaction conducted in the state of New York. The validity of Section 229 b, Civil Practice Act of the state of New York, should be sustained as a valid exercise of the police power.

Reasons for Granting Writ.

1. The decision of the United States Circuit Court of Appeals for the Second Circuit in the action at bar is in conflict with the decision of the United States Circuit Court of Appeals for the Ninth Circuit rendered in *Alaska Commercial Co.* v. *Debney,* 144 Fed. 1 (1906).

2. The decision of the United States Circuit Court of Appeals for the Second Circuit in the action at bar is in conflict with the decisions of this Court in *International Harvester Company* v. *Kentucky,* 234 U. S. 579, *Henry L. Doherty & Co.* v. *Goodman,* 294 U. S. 623 and *Hess* v. *Pawlowski,* 274 U. S. 352.

3. The decision of the United States Circuit Court of Appeals for the Second Circuit in the action at bar is in conflict with the decision by the New York State Court of

Appeals in *Tauza* v. *The Susquehanna Coal Company*, 220 N. Y. 259.

WHEREFORE, it is respectfully prayed that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination, a full and complete transcript of the record and all proceedings in the case at bar and that the decree of said United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioner may have such other, further and different relief in the premises as to this Court may seem just and proper.

And your petitioner will ever pray.

EMANUEL DEUTSCH, individually and doing business under the firm name and style of UNITY SANITARY SUPPLY CO.

By IRVING H. SAYPOL,
Counsel.